IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.443 OF 1988

National Insurance Co.Ltd. ...Appellant
Vs.
Manojkumar Kundanlal Amesar & Ors. ...Respondents

Mrs A.A. Agarwal for the Appellant.
None for the Respondents.

CORAM : A. S. OKA, J.

DATE : MARCH 31, 2006.

JUDGMENT:

1. Heard Mrs Agarwal, learned Counsel appearing for the Appellant-Insurance Company. The challenge in this Appeal is to the judgment and award dated 07th January, 1988 passed by the learned Member of the Motor Accident Claims Tribunal at Nasik.

2. With a view to appreciate the submissions made by the learned Counsel appearing for the Appellants, it will be necessary to refer to the facts of the case in brief. The original claimants are the legal representatives of the deceased. An auto-rickshaw owned by the original opponent No.5 and driven at the relevant time by the original opponent No.4 as well as a rickshaw-tempo owned by the original opponent No.2 and driven at the relevant time by opponent No.1 are the vehicles involved in the accident. The

auto-rickshaw was proceeding from Nasik to Nasik road and the rickshaw-tempo was coming from Nasik road towards Nasik. One Kisan who was allegedly occupying the right hand side seat in the auto-rickshaw suffered injuries in the accident and ultimately, he succumbed to injuries. The present Appellant is the insurer of the auto-rickshaw-tempo and the Respondent No.5 (original Opponent No.6) is the insurer of the auto-rickshaw involved in the accident.

2. The learned Member of the Tribunal held that the deceased Kisan Patole was sitting on the right hand side seat in the auto-rickshaw. The learned Member of the Tribunal held that it was not established that the auto-rickshaw went out of control and dashed against the rickshaw-tempo. The learned Member of the Tribunal held that the drivers of both the vehicles were equally negligent in causing the accident. The compensation awarded was Rs.93,100/- with future interest. The learned Member of the Tribunal directed that the Respondent No.5 should pay compensation of Rs.15,000/- plus proportionate costs as liability of the Respondent No.5 was limited to Rs.15,000/-. The entire balance amount was made payable by the Appellant.

3. Mrs Agarwal, learned Counsel appearing for the Appellant submitted that after recording a finding that there was a composite negligence on the part of drivers of both the vehicles to the extent of 50%, the Appellant is directed to pay more than 50% of the compensation. She submitted that in view of the categorical finding recorded that both the drivers are equally responsible, there should have been apportionment of the compensation at the rate of 50% each between the owners and issurance Companies of both the vehicles. Though all the Respondents are duly served with notice, none appears from them.

4. I have considered the evidence on record for considering the submissions made by Mrs. Agarwal. It must be noted at outset that a case was made out before the Tribunal that Kisan was sitting on the front seat next to driver of the auto-rickshaw which is exclusively meant for driver. The said contention has been negatived by the Tribunal. The claimants have examined one Somnath Kurhade who is stated to be eye-witness to the accident. He stated that the auto-rickshaw in which deceased was travelling came from Nasik side when the rickshaw-tempo came from Nasik road side. According to him the auto-rickshaw was going by its left side of the road and

rickshaw-tempo which came in a very fast speed from wrong side and dashed against the auto-rickshaw. The dash was on the right side of the auto-rickshaw and that is the reason why deceased who was sitting on the right hand side seat of the auto-rickshaw suffered fatal injuries. In the cross-examiation the said witness deposed that the auto-rickshaw was at the distance of about five feet away from the centre of the road towards its left side. Even going by the said admission it is obvious that auto-rickshaw had not gone on its wrong side. If the impact of accident has taken place on the correct side of the auto-rickshaw, there is a possibility that it was the rickshaw-tempo which came on its wrong side and dashed against the auto-rickshaw. The evidence of Manojkumar Amesar- the driver of the rickshaw-tempo has been recorded by the Tribunal. According to him after the impact, the tempo tilted on its side. He tried to state that the deceased was sitting on driver’s seat alongwith the driver. However, that case is disbelieved by the Tribunal.

5. Going by the evidence on record it appears obvious to me that even assuming that in case of composite negligence, the liability could have been apportioned, it could not have been apportioned on 50%

basis. There appears to be more negligence on the part of the driver of the rickshaw-tempo which is insured with the Appellant. All that can be said about auto-rickshaw driver is that he did not make any effort to avoid the accident.

6. The Tribunal by impugned award has directed that the Opponent No.6 should pay Rs.15,000/- plus proportionate costs and the balance amount is made payable by the Appellant-Insurance Company. There is no dispute about the existence of contract of insurance as far the Appellant is concerned.

7. It is very difficult to find fault with the the award passed by the Tribunal. However, it will have to be clarified here that if any amount is paid by the Appellant earlier towards no fault liability, the said amount can be adjusted by the Appellant-Company.

8. Subject to what is stated above, the Appeal is dismissed with no orders as to costs.

JUDGE